

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDY L. RUTH

Claimant

VS.

DERBY FAMILY MEDICAL CENTER

Respondent

AND

TRAVELERS INDEMNITY CO. OF AMER.

Insurance Carrier

Docket No. 1,028,615

ORDER

Respondent and its insurance carrier request review of the August 3, 2006 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's accidental injury arose out of and in the course of employment and timely notice was provided. The ALJ ordered respondent to provide names of three physicians for claimant to select one as the authorized physician to provide medical treatment.

The respondent requests review of whether the claimant sustained an accidental injury arising out of and in the course of employment as well as timely notice. Respondent argues the claimant's current condition is the result of a preexisting condition which has not been aggravated by any work activities. Respondent further argues the claimant did not provide timely notice within 10 days.

Claimant argues she injured her back packing and carrying her office materials and that she told her supervisor she had hurt her back. Consequently, the claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

On March 23, 2006, the claimant was packing her office in order to move to another area in the building. This required her to lift, bend and stoop in order to pack boxes. She testified that she filled boxes and a plastic container with the materials from her workplace and then scooted the boxes with her foot because they were too heavy to lift. Claimant testified she had a gradual onset of back pain and finally told her supervisor that her back was hurting just before she left work for the day. But she agreed that she did not tell her supervisor what had caused her back pain.

The claimant had previous back problems unrelated to her work and had received a series of epidurals the year before this alleged incident. On March 28, 2006, claimant called and talked to her doctor's nurse seeking a referral for an epidural injection. The note of that conversation indicated claimant was "having lumbar pain again, would like to get in for epidural before it gets to [sic] bad."¹ Claimant could not recall whether she mentioned she had injured herself at work.

On March 30, 2006, the claimant saw her personal physician and although she testified that she told him she injured her back moving boxes at work, his office notes of that visit simply reflect claimant had back pain and had an epidural. Nor is there mention of a work-related injury in any of the doctor's subsequent notes as he continued to treat claimant. Claimant was referred to physical therapy for approximately three weeks. After completing the physical therapy on April 17, 2006, the claimant received a TENS unit to use at home.

On May 17, 2006, Dr. Murati diagnosed the claimant with right SI joint dysfunction and low back pain secondary to radiculopathy. Dr. Murati recommended physical therapy, anti-inflammatory and pain medication. The doctor further placed temporary restrictions on the claimant of no lifting, carrying, pushing, pulling greater than 10 pounds as well as no crawling.

Claimant's supervisor, Sonja Fiechtl, testified that on March 23, 2006, she saw claimant starting to push a plastic tub, so Ms. Fiechtl took over and pushed the tub. Ms. Fiechtl could not recall any conversation with claimant that day about claimant's back pain. Ms. Fiechtl testified:

Q. Did you have any conversations with her where she mentioned back pain?

A. I don't recall anything like that.

¹ P.H. Trans., Resp. Ex. 2.

Q. Do you recall anything about it? Well, did you have a conversation with her at that moment?

A. I do not recall that, no.

Q. When did you find out that she was relating a back problem to work?

A. I don't think I really even knew that until after, I think it was April 5th when she called in, well, I take that back. She called in, she came back to work a couple of days, called in the following day to tell me that she was having an epidural, but I didn't know that it was regarding work or anything like that. I just thought, she's always had ongoing back pain, I thought this was part of it again, just a flare-up.

Q. When was the first time you knew anything about it being a work-related matter when you heard from the - -

A. From the attorney, that's correct.²

Ms. Fiechtl concluded that she was notified about the workers compensation claim in late April.

A co-worker, Teresa Engro, testified that on March 23, 2006, she helped claimant move most of the materials from her office. Ms. Engro testified that claimant asked for her help. But Ms. Engro agreed that she did not watch claimant at all times that day. Finally, Ms. Engro noted claimant did not complain about having back pain that day or after that day.

Claimant agreed that she consulted an attorney and claimed she suffered a work-related injury after respondent transferred her to the collection department, which would be considered a demotion.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the

² *Id.* at 39-40.

notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The claimant agreed that she did not tell her supervisor that she had injured her back packing and moving at work on March 23, 2006. Instead, she simply told her supervisor her back was hurting. No request for medical treatment was made. Her supervisor does not recall the conversation but noted that if claimant had alleged she was injured at work she would have immediately processed the claim.

It was not unusual for claimant to make complaints of pain as she had ongoing health problems unrelated to work including back problems for which she had received a series of epidural injections. Claimant's supervisor was aware of these problems as well as claimant's treatment. As a result, even assuming claimant did make a generalized complaint of back pain, without relating the pain to her work it cannot be said under these facts that respondent was put on notice claimant was alleging a work-related injury.

This Board member concludes claimant has failed to meet her burden of proof that she provided timely notice of her alleged work-related injury.

Moreover, after the alleged incident claimant continued working and when she did seek treatment she never mentioned a work-related incident, instead she simply noted that she again had back pain. When she called to inform her supervisor that she was going to get an epidural, she never mentioned it was for a work-related injury. Claimant had filled out the paperwork for FMLA leave before the alleged incident and apparently it was processed shortly after March 23, 2006. The paperwork included back complaints among her prior problems. Finally, it was only after claimant was reassigned to a job that was considered a demotion that she consulted an attorney and filed her claim of a work-related injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

³ K.S.A. 44-534a.

⁴ K.S.A. 2005 Supp. 44-555c(k).

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated August 3, 2006, is reversed and compensation denied.

IT IS SO ORDERED.

Dated this 31st day of October 2006.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge